

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION**

PRECISION CPAP, INC.; MEDICAL)
PLACE, INC.; PHASE III VANS, INC.,)
d/b/a EAST MEDICAL EQUIPMENT AND)
SUPPLY; and MED-EX,)

Plaintiffs,

vs.

Civil Action No. 2:05-CV-1096-MHT-DRB

**JACKSON HOSPITAL; MED-SOUTH,)
INC.; JMS HEALTH SERVICES, L.L.C.,)
d/b/a JACKSON MED-SOUTH HOME)
HEALTH, L.L.C.; BAPTIST HEALTH,)
INC.; AMERICAN HOME PATIENT, INC.;)
BAPTIST VENTURES - AMERICAN)
HOME PATIENT,)**

ORAL ARGUMENT REQUESTED

Defendants.

MOTION TO DISMISS

COME NOW Defendants, by and through their respective counsel, and pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), move this Honorable Court to dismiss all claims in the Plaintiffs' Complaint. In support of this motion, Defendants incorporate their contemporaneously filed Memorandum in Support of Motion to Dismiss as if fully set forth herein, and state as follows:

1. Plaintiffs have failed to allege that the conduct alleged in the complaint involves interstate commerce, and in fact plead facts that make clear the conduct is purely intrastate in nature. Therefore, the only basis on which Plaintiffs purport to invoke this Court's jurisdiction - claims arising under the federal Sherman and Clayton Acts - does not exist. Therefore, the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

2. Plaintiffs' Complaint should be dismissed for lack of antitrust standing.

3. Facts alleged in Plaintiffs' Complaint make clear that Plaintiffs' claims are barred by the statute of limitations.

4. Plaintiffs have failed to state a claim for relief under the Sherman or Clayton Acts; thus, the federal claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

5. The dismissal of Plaintiffs' federal claims under Fed. R. Civ. P. 12(b)(6) requires dismissal of the Alabama Antitrust Act claim under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

6. Plaintiffs have failed to state a claim under the Alabama Antitrust Act, which is interpreted in accordance with federal antitrust law; thus, Plaintiffs' state law count fails to state a claim and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

WHEREFORE, Defendants respectfully request that this Court conduct oral argument on this motion, dismiss with prejudice the Complaint, and grant Defendants such other relief as may be appropriate.

Respectfully submitted this the 31st day of January, 2006.

ORAL ARGUMENT REQUESTED

s/ James E. Williams

James E. Williams / ASB-9283-W84J

One of the Attorneys for Defendants

**Baptist Health, American Home Patient, Inc.
and Baptist Ventures-American Home Patient**

Melton, Espy & Williams, PC

301 Adams Avenue

Montgomery, AL 36104

Telephone: (334) 263-6621

Facsimile: (334) 269-9515

jwilliams@mewlegal.com

s/ Glenn B. Rose

Glenn B. Rose (TN Bar 010598)
One of the Attorneys for Defendants
**American Home Patient, Inc.
and Baptist Ventures-American Home Patient**
Harwell Howard Hyne Gabbert & Manner, PC
315 Deaderick Street, Suite 1800
Nashville, TN 37238
Telephone: (615) 256-0500
Facsimile: (615) 251-1059
gbr@h3gm.com

s/ Dennis R. Bailey

Dennis R. Bailey / ASB-4845-I71D
One of the Attorneys for Defendants
**Jackson Hospital; JMS Health Services, L.L.C.
dba Jackson Med-South Home Health L.L.C.**
Rushton, Stakely, Johnston & Garrett, P.A.
184 Commerce Street
Montgomery, AL 36104
Telephone: (334) 206-3100
Facsimile: (334) 262-6277
drb@rsjg.com

s/ Mike Carlson

Mike Carlson / ASB-5825-A62W
One of the Attorneys for Defendants
**JMS Health Services, L.L.C. dba Jackson Med-
South Home Health L.L.C. and Med-South, Inc.**
William Carlson & Associates, P.C.
Post Office Box 660955
Birmingham, AL 35266
Telephone: (205) 823-1842
Facsimile: (205) 823-8242
wtcpilot@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify that on this the 31st day of January, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of such filing to the following:

Attorney for Plaintiffs:

Brian M. Clark
Wiggins, Childs, Quinn & Pantazis
The Kress Building
301 19th Street North
Birmingham, AL 35203
bclark@wcqp.com

I also served a copy of the foregoing by first-class mail on:

Dwayne L. Brown, Esq.
5926 Carmichael Road
Suite C
Montgomery, AL 36123-0205
dbrown@dbrownatty.com

s/ Glenn B. Rose

Glenn B. Rose (TN Bar 010598)
One of the Attorneys for Defendants
American Home Patient, Inc.
and Baptist Ventures-American Home Patient
Harwell Howard Hyne Gabbert & Manner, PC
315 Deaderick Street, Suite 1800
Nashville, TN 37238
Telephone: (615) 256-0500
Facsimile: (615) 251-1059
gbr@h3gm.com